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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-7104

MAX SCHARFMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No.

MAX SCHARFMAN,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Max Scharfman respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 27, 1971.

OPINION BELOW

The opinion of the Court of Appeals not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 27, 1971. This petition for -ertiorari was filed on November 26, 1971 within the time extended for filing the petition by order of Mr. Justice Thurgood Marshall. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Whether the conviction herein should be vacated and a new trial ordered because books and records were introduced at the petitioner's trial which were seized in violation of the Fourth Amendment pursuant to two warrants issued on the basis of affidavits which contained no information upon which probable cause for the seizure of those books and records could be predicated. In addition, those books and records were privileged under the Fifth Amendment and nothing in those search warrants, nor any act of the petitioner constituted a waiver of his Fifth Amendment privilege.

PROVISIONS INVOLVED

The Fourth and Fifth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On April 10, 1969 the defendant was charged in a one count indictment with possession of furs stolen from an

interstate shipment, knowing the same to have been stolen in violation of 18 U.S.C. Sec. 659. The defendant waived a jury and was convicted after trial before the Honorable Edward C. McLean in the Southern District of New York on February 11, 1971. He was sentenced to 2 years imprisonment on March 19, 1971.

On November 13, 1967 an REA truck carrying furs and other chattels was hijacked on West Street near Christopher Street in Manhattan shortly after leaving its terminal on the way to Newark Airport. On March 20, 1968 search warrants were executed at Rosalie Furs, 178 North Avenue, New Rochelle, New York.

Pursuant to the search warrant for the New Rochelle store, FBI agents seized a number of furs. (Government's Exhibits 1A, 2A, 2B, 2C, 3A, 5A, 6A, 7A, 7B, 10A, 13A, 13B). In the course of that search, they also seized a looseleaf binder which was in the handwriting of the petitioner and two boxes of index cards and which were admitted in evidence against the petitioner as Government's Exhibits 17, 18, and 19.

Pursuant to the search warrant for the Freeport store, FBI agents seized a number of furs. In the course of that search, they also seized a box of index cards which was a business record of that store and which was admitted in evidence against the petitioner as Government's Exhibit 16. No one was arrested during the course of these

searches.

The petitioner then moved to suppress the evidence seized pursuant to these warrants twice before trial and moved to vacate the judgment of conviction at the time of sentencing on the ground that evidence introduced at trial had been unconstitutionally seized. The petitioner's motion to suppress was denied by the District Court and that decision was affirmed on appeal in an opinion a copy of which is annexed to this petition.

REASONS FOR GRANTING THE WRIT

Both the warrant for the New Rochelle store and the warrant for the Freeport store authorized the seizure of books and records though the affidavits in support of these warrants did not contain any information upon which to predicate probable cause for their seizure. Copies of these warrants and the affidavits in support of them are annexed to this petition.

In the course of executing the search warrant at the New Rochelle store FBI agents seized a looseleaf binder and 2 boxes of index cards. At the Freeport store agents seized a box of index cards. All of these were admitted in evidence against the defendant. The looseleaf binder was written in part by the defendant and comprised inventory consignments of the business. In summation the Assistant U.S. Attorney relied on this looseleaf binder for

evidence of guilty knowledge on the part of the defendant because one item of inventory in the defendant's handwriting was dated before the hijacking and was out of numerical order. The index cards seized from Freeport were identical to some of the index cards seized from New Rochelle, in that they referred to the same fur garments and these were relied on by the government to show the connection between the 2 stores and to establish the defendant's connection with the Freeport store.

The Circuit Court of Appeals justified the seizure of these books and records over the petitioner's argument that there was no probable cause for their seizure on the theory that the magistrate who passed upon the sufficiency of the affidavits could make use of his "background" to determine if probable cause existed. Thus, if, as the affidavits alleged, there were stolen furs on the two premises searched, there were probably books and records containing some notations about those furs which would be evidence of the criminal possession. The Court searched this conclusion because the stores searched were legitimate fur stores. Contrariwise, the Court of Appeals indicated that if any books and records found in the stores did not reflect the presence therein of the stolen furs this also would be incriminating evidence that the petitioner knew that the possession of these furs was illegitimate. Thus, the Court of Appeals took the position that because the stores searched

were, legitimate fur enterprises any books and records found there would be probative evidence regardless of whether or not they reflected anything about the stolen furs. To further appreciate the speculative quality of this reasoning it must be remembered that although both affidavits requested permission to seize books and records which were being used as means and instrumentalities of the crime, there was no information set forth in either affidavit that such books and records existed and thus, no information that any books and records found would contain any evidence about the stolen furs.

Thus, the implication of the decision of the Circuit Court of Appeals is that anytime there is probable cause to search of a legitimate business there is always probable cause to conduct a further search for any books and records that may exist.

The reasoning of the Court of Appeals was a string of suppositions and hypothesis not grounded on any factual basis. If books and records were to be found on the premises searched, and there was no information that such books and records existed, then may be they would reflect something about the stolen furs though there was no information to support this either. Cases in this Court have repeatedly established the proposition that probable cause must be based on facts presented to a neutral magistrate and must be determined from the four corners of the supporting

affidavit and not upon educated guesses or speculations. See Spinelli v. United States, 393 U.S. 410 (1969; Aguilar v. Texas, 378 U.S. 108 (1964); Nathanson v. United States, 290 U.S. 41 (1933); Byavs v. United States, 273 U.S. 28 (1927).

Thus, this Court should issue a writ of certiorari to review the Circuit Court's determination that probable cause existed for the seizure of books and records.

In addition, the petitioner contended in the Circuit Court as he does here, that assuming that probable cause for the seizure of books and records existed, the seizure of those articles was nevertheless improper because of the Fifth Amendment's privilege against self-incrimination. This issue has never been decided by this Court and there is now a split in the opinions of the Circuit Courts on this issue. In Hill v. Philpott, 445 F. 2d 144 (7th Cir. 1971) the Seventh Circuit Court of Appeals held the seizure, pursuant to a search warrant, of books and records of a doctor charged with income tax evasion was improper under the Fifth Amendment. Likewise in United States v. Blank, 330 F. Supp. 783 (N.D. Ohio 1971), the Court held that seizure of a bookmaker's gambling records pursuant to a search warrant was improper under the Fifth Amendment. In this case the Second Circuit Court of Appeals found that "The Fourth Amendment does not protect broadly against the seizure whose compulsory production

would be forbidden by the Fifth." The distinction relied upon by the Second Circuit seems to be that the execution of a search warrant does not compel disclosure by the petitioner in violation of the Fifth Amendment since the documents were seized by government agents and the petitioner was not required to hand them over. This distinction is not relevant for Fifth Amendment purposes since the essence of the Fifth Amendment's protection is that the petitioner may not be compelled to incriminate himself by any act of government, whether authorized by subpoena or search warrant or by unlawful interrogation and it is irrelevant to the petitioner which method is employed to extract the privileged matter. This case raises the issue of the Fifth Amendment protection to be accorded to books and papers seized pursuant to a search warrant in clear outline and certiorari should be granted to resolve the conflict in opinions which now exists among the Second, Sixth and Seventh Circuits.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

EDMUND ALLEN ROSNER
Counsel for Petitioner
Office & P.O. Address
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New York, N.Y. 10013

November 24, 1971

CERTIFICATION

I hereby certify that on this 24th day of November, 1971 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

EDMUND ALLEN ROSNER
Counsel for Petitioner
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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 99
(Argued September 15, 1971
Docket No. 71-1470

September Term, 1971
Decided September 27, 1971)

UNITED STATES OF AMERICA,

Appellee,

v.

MAX SCHARFMAN,

Defendant-Appellant.

Before: KAUFMAN, ANDERSON, and FEINBERG, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward C. McLean, Judge, entered after the court without a jury found appellant guilty of possession of furst stolen from an interstate shipment, in violation of 18 U.S.C. § 659.

Affirmed.

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Nancy Rosner, New York, N.Y. (Rosner & Rosner on the brief), for Defendant-Appellant.

Maurice M. McDermott, Assistant U.S. Attorney (Whitney North Seymour, Jr., U.S. Attorney for the Southern District of New York, and Peter F. Rient, Assistant U.S. Attorneys, of Counsel), for Appellee.

KAUFMAN, Circuit Judge

Max Scharfman appeals from his conviction, after a trial before Judge Edward C. McLean in the Southern District of New York, of unlawful possession of furst stolen from an interstate shipment in violation of 18 U.S.C. § 659.

Scharfman does not question the sufficiency of the evidence, nor does he assert any other ground for the reversal of his conviction except that all of the physical evidence admitted at his trial was sezied during an illegally conducted search. Two pre-trial motions to suppress the evidence were denied. The second motion was made after the decision in Spinelli v. United States, 393 U.S. 410 (1969), but was denied by Judge Mansfield although he assumed the retroactivity of Spinelli's standards. We find no reason to reverse these

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determinations.

On November 13, 1967, a Railway Express Agency International (REA) truck loaded with several hundred fur garments and destined for out of state buyers was hijacked at gun point in New York City. Some months later an unnamed informant told FBI agents that furs from that shipment could be found at two stores, Rosalle Furs, Inc. in New Rochelle and a Freeport location housing Rosalle Furs, Inc. and H. Appel Furs of Freeport, Inc. The informant had previously helped agents secure four convictions and was himself an experienced furrier. His tip was corroborated by Herbert Perlman, an employee of one of the shippers whose furs were hijacked. He visited the Rosalle store in New Rochelle and observed a "natural ranch mink coat" which he positively identified as having been a part of the hijacked shipment. FBI agents also discovered that the two stores were owned by Scharfman and one Frank Moccardi. United States Commissioner Earle N. Bishopp issued warrants for the search of these two premises on the basis of affidavits by FBI Agents Kilcommons and Fusco reciting the above facts. The affidavits sought, and the warrants granted, permission to search for books and records used as instrumentalities of the crime as well as the garments.[1] The two premises were searched on March 20, 1968 by Special Agents of the FBI. Index cards and large quantities of furs were siezed from

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each store; in addition, a binder of consignment memoranda was taken from the Freeport establishment.

We see little merit to appellant's argument that probable cause for the search did not exist. The reliability of the informant was demonstrated by his knowledge of the underlying crime, his knowledge of the fur industry, and information which he supplied in the past and which also led to four convictions. These factors clearly meet the requirement laid down in Aguilar v. Texas, 378 U.S. 108 (1964), for valid warrants based on information from unidentified informants. Moreover, the trustworthiness of the information was independently substantiated and thus complies with the standard set forth in Spinelli v. United States, 393 U.S. 410 (1969).

Scharfman argues that the warrants are defective for still another reason. He submits that the failure to particularize the items to be seized converted the search into a general one, and accordingly violated the fourth amendment.[2] We do not agree, although we recognize that the property must be identified sufficiently to prevent "a mere roving commission." United States v. Quantity of Extracts, Bottles, etc., 54 F.2d 643, 644 (S.D. Fla. 1931). We are also

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mindful that in Stanford v. Texas, 379 U.S. 476 (1965), involving a seizure of some 2000 pieces of literature relating to Communist Party operations, the Supreme Court held that the particularity requirement "is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for the seizure is the ideas which they contain." Id. at 485. But, when first amendment rights are not involved, the specificity requirement is more flexible. Indeed, in Stanford the Court refused to decide that the description "case of whiskey" was too generalized. Id. at 486; see Steele v. United States, 267 U.S. 498 (1928). In Vitale v. United States, 383 F.2d 121, 122 (1st Cir. 1967), a search and seizure of stolen watchbands was sustained. The court said that "[w]here goods are of a common nature and not unique there is no obligation to show the one sought (here a substantial quantity of watch bands) necessarily are the ones stolen, but only to show the circumstances indicating this to be likely."[3] See also United States v. Averell, 296 F. Supp. 1004 (S.D.N.Y. 1969) (seizure of thousands of undescribed hijacked wigs held constitutional).

The futility of further particularization is clear in this case. If the REA manifest had contained descriptions of the hijacked garments

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and these had been made available to the FBI (this is not conceded by the government), the warrant conceivably could have contained a descriptive itemization. In such an instance, however, if the searching agents entered a specified location with thousands of garments on the premises but the warrant itemized only a few hundred which had been allegedly stolen, the task of identifying and seizing the specific garments would have required a legion of fur experts to perform the task in a reasonable period. As we said in another context concerning appropriate search warrant procedures, the fourth amendment requirements do not impose a burden on the executing office "beyond his power to meet." United States v. Bozza, 365 F.2d 206, 225 (2d Cir. 1966).

Scharfman also attacks the seizure of the index cards and consignment memorandum book because the warrant failed to describe them adequately. He further argues that probable cause did not exist for the seizure. It is settled that magistrates can make use of their background of experience to determine whether probable cause exists. See Rosencranz v. United States, 356 F. 2d 310 (1st Cir. 1966). See also Brinegar v. United States, 338 U.S. 1960 (1948) (probable cause to arrest); Irby v. United States, 314 F. 2d 251 (D.C. Cir.), cert. denied, 374 U.S. 842 (1963)

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(probable cause to arrest). It was entirely reasonable, under the circumstances of this case, for the magistrate to conclude that books and records would be utilized as instrumentalities in connection with the crime of disposing of hundreds of fur garments through a facade of legitimacy. Here, entries were made for the stolen garments, but the attempt at concealment of their source backfired when an obviously predated entry was found. The records could also be valuable evidence where a so-called "legitimate" front would record his inventory but omit the stolen goods. Finally, a general search for books and records was not directed by the warrant. Only those books and records used as "means and instrumentalities of the crime" were or could have been seized pursuant to the warrant. This adequately particularized the items seized. "When circumstances make an exact description of instrumentalities [sic] a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking." James v. United States, 416 F.2d 467 (5th Cir. 1969), cert. denied, 397 U.S. 907 (1970).

Scharfman also argues that the memo book, containing entries written in his own hand, should have been suppressed because the fifth amendment would permit him to refuse to produce such evidence

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if he had possession. His analogy is inapposite. We held in United States v. Bennett, 409 F.2d 888, 896, cert. denied, sub nom. Jessup v. United States, 396 U.S. 852, reh. denied, sub nom. Haywood v. United States, 396 U.S. 949 (1969), that "the Fourth Amendment does not protect broadly against the seizure whose compulsory production would be forbidden by the Fifth."

FOOTNOTES

1 The Freeport warrant authorized a search for "fur coats, stoles, jackets and other finished fur products, books, records, and other fruits and instrumentalities...." The New Rochelle warrant authorized a search for "the property specified [furs] and for such books and records as are being used as means and instrumentalities of the above described crimes...."

2 The fourth amendment provides:

> "...no warrants shall issue... [unless] particularly describing the...things to be seized."

3 Although the specificity point was not explicitly raised in Vitale, it is inconceivable that by mixing legitimately obtained watchbands

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FOOTNOTES

with the stolen merchandise so as to make them virtually indistinguishable, the defendant could invalidate the seizure because more specificity has become impossible. The allegedly stolen merchandise is "particularly describ[ed]," in such instances even when generic.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN,

HON. ROBERT P. ANDERSON,

HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAX SCHARFMAN,

Defendant-Appellant.

APPENDIX B

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s/ A. DANIEL FUSARO
Clerk

(A true copy,
(s/ A. Daniel Fusaro
(Clerk
(

APPENDIX C

Affidavit for Search Warrant for the Premises at 18 West Merrick Road, Freeport, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against- Title 18, U.S.C.

PREMISES 18 WEST MERRICK ROAD, FREEPORT, NEW YORK.

EASTERN DISTRICT OF NEW YORK, SS:

BERNARD T. FUSCO, being duly sworn, says that he is a Special Agent of the Federal Bureau of Investigation, United States Department of Justice, duly appointed according to law and acting as such.

That your deponent has reason to believe that several hundred fur garments and approximately two hundred and Fifty (250) men's and ladies' yellow gold-filled and stainless steel watch bands, are being kept and concealed in the premises known as 18 West Merrick Road, Freeport, New York, which premises consist of a one story brick front attached building, on the windows of which premises is printed the following:

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Affidavit for Search Warrant for the Premises at 18 West Merrick Road, Freeport, New York

H. Appel Furs of Freeport, Inc.: and Rosalle Furs, and which premises include a basement level, which merchandise constitutes the fruits and proceeds of an armed hijacking of a Railway Express Agency, International truck, bearing Fleet No. 4A 387, and bearing New York License Plate No. 147 243, which truck was hijacked at gunpoint at the intersection of West and Christopher Streets, New York City, New York, on or about November 13, 1967, and which merchandise was moving as and constituting a part of an interstate shipment from New York City, New York, to Savannah, Georgia, in violation of Title 18, United States Code, Sec. 659.

The source of your deponent's information and the grounds for his belief are:

1. On or about Wednesday, March 13, 1968, and thereafter, your deponent received information to the effect that at least a substantial portion of the above-described stolen merchandise was presently located at both of the following establishments: H. Appel Furs of Freeport, Inc. and Rosalle Furs, 18 West Merrick Road, Freeport, New York, and Rosalle Furs, 178 North Avenue, New Rochelle, New York.

APPENDIX C

Affidavit for Search Warrant for the Premises at 18 West Merrick Road, Freeport, New York

2. The source of the above-mentioned information is a previously reliable informant who has given information to your deponent in connection with several previous investigations of criminal activities and which information proved to be correct, and in at least four of which cases convictions were obtained.

3. The source of the above-mentioned information has been a furrier and has been employed in the fur business in New York City for over twenty years, and is an expert in the affairs and practices of the fur industry.

4. Investigation by Special Agents of the Federal Bureau of Investigation which revealed that both of the above-described establishments are operated jointly by the same persons, namely one Max Scharfman and one Frank Moccardi. In addition, one H. Appels Furs of Freeport, Inc. is also located at the above-described establishment at 18 West Merrick Road, Freeport, New York.

5. In the late afternoon of March 19, 1968, one Herbert Perlman, a partner in the fur business of Yarmuth Brothers, New York City, New York accompanied by Special Agents of the Federal Bureau of Investigation, did visit the establishment

APPENDIX C

Affidavit for Search Warrant for the Premises at 18 West Merrick Road, Freeport, New York

located at 178 North Avenue, New Rochelle, New York, and did positively identify on these premises one natural ranch mink jacket with French-type cuffs as having been made by his firm and as having been part of the above-described Railway Express Agency shipment.

6. Further investigation by your deponent which revealed that the above-described natural ranch mink jacket was in fact part of the aforesaid Railway Express Agency shipment.

7. Observations by Special Agents of the Federal Bureau of Investigation, which revealed that a car registered to H. Appel Furs of Freeport, Inc. was seen parked in front of the establishment at 178 North Avenue, New Rochelle, New York.

8. The above-mentioned previously reliable informant did tell your deponent that on or about March 13, 1968, and thereafter on at least two separate occasions he, the informant, observed several thousand finished fur skins in the basement of the establishment located at 18 West Merrick Road, Freeport, New York, and that within the experience and expertise in the fur industry of the informant, this great number of furs was far too many to have constituted any legitimate business purpose of any sort.

APPENDIX C

Affidavit for Search Warrant for the Premises at 18 West Merrick Road, Freeport, New York

WHEREFORE, your deponent respectfully requests that a search warrant be issued authorizing your deponent, or andy Special Agent of the Federal Bureau of Investigation, to enter at any time in the daytime, with proper assistance, the premises at 18 West Merrick Road, Freeport, New York, and there search for and swize the property specified and such books and records as are being used as means and instrumentalities of the above-described crimes.

s/ BERNARD T. FUSCO

Sworn to before me this
20th day of March, 1968.

UNITED STATES COMMISSIONER,
EASTERN DISTRICT OF NEW YORK.

APPENDIX D

SEARCH WARRANT FOR THE PREMISES AT 18 WEST MERRICK ROAD, FREEPORT, NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

PREMISES 18 WEST MERRICK ROAD, FREEPORT, NEW YORK

SEARCH WARRANT

To any Special Agent of the Federal Bureau of Investigation, United States Department of Justice.

Affidavit having been made before me by Bernard T. Fusco, Special Agent, Federal Bureau of Investigation, United States Department of Justice, that he has the reason to believe that on the premises known as 18 West Merrick Road, Freeport, New York, which premises consist of a one story brick front attached building, on the windows of which premises is printed the following: H. Appel Furs of Freeport, Inc., and Rosalle Furs, and which premises include a basement level there is now being concealed certain property, namely several hundred fur garments and approximately two hundred and fifty (250) men's and ladies' yellow gold-filled and stainless steel watch bands, which merchandise constitutes the fruits and

APPENDIX D

SEARCH WARRANT FOR THE PREMISES AT 18 WEST MERRICK ROAD, FREEPORT, NEW YORK

proceeds of an armed hijacking of a Railway Express Agency, International truck, bearing Fleet No. 4A 387, and bearing New York License Plate No. 147-243, which truck was hijacked at gunpoint at the intersection of West and Christopher Streets, New York City, New York, on or about November 13, 1967, and as I am satisfied that the above-described premises are located within the Eastern District of New York, and that there is probable cause to believe that the property so described is being concealed on the premises above-described and that the foregoing grounds for application for issuance of the search warrant exist,

YOU ARE HEREBY COMMANDED to search forthwith the place named for the property specified and for such books and records as are being used as means and instrumentalities of the above described crimes at any time in the daytime and if the property be found there to seize it, leaving a copy of this warrant receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 20th day of March 1968.

United States Commissioner
EASTERN DISTRICT OF NEW YORK

APPENDIX E

AFFIDAVIT FOR SEARCH WARRANT FOR THE PREMISES AT 178 NORTH AVENUE, NEW ROCHELLE, NEW YORK

In the Matter of a search warrant for the premises known as Rosalle Furs, 178 North Avenue, New Rochelle, New York

BEFORE EARLE N. BISHOPP, United States Courthouse, Foley Square, New York, N.Y. 10007

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Rosalle Furs, 178 North Avenue, New Rochelle, New York in the Southern District of New York there is now being concealed certain property, namely fur coats, stoles, jackets and other finished fur products, books, records, and other fruits and instrumentalities which are being kept as fruits and instrumentalities of a violation of Title 18, United States Code, Sections 371 and 659

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE RIDER ATTACHED.

s/ John J. Kilcommons
Special Agent, F.B.I.

Sworn to before me, and subscribed in my presence, March 20, 1968

s/ Earle N. Bishopp,
United States Commissioner

APPENDIX E

RIDER TO AFFIDAVIT FOR SEARCH WARRANT FOR THE PREMISES AT 178 NORTH AVENUE, NEW ROCHELLE, NEW YORK

RIDER

Investigations made in the ordinary course of his official duties reveal, in part, the following:

1. That on November 13, 1967, an REA International Truck, New York license No. 147-243, Fleet Truck Number 4A387, while en route to Newark, New Jersey, was hijacked from the vicinity of West and Christopher Street, New York City at gun point and said hijack was reported to the Federal Bureau of Investigation by the REA Express Company on that day;

2. That a search of the records of the REA company revealed that on the above-described truck at the time of the above-mentioned hijack there were, in addition to other items, approximately 122 cartons and packages containing finished fur garments, all consigned to places outside New York State;

3. That on March 19, 1968, an informant of known reliability, who has furnished information on many occasions and whose information has resulted in at least four convictions, said that the furs from the above-described REA shipments were at the premises known as Rosalie Furs, 178 North Avenue, New Rochelle, New York.

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RIDER TO AFFIDAVIT FOR SEARCH WARRANT FOR THE PREMISES AT 178 NORTH AVENUE, NEW ROCHELLE, NEW YORK

4. That on March 19, 1968, Herbert Pearlman a fur manufacturer and owner of Yarmouth Brothers, 345 Seventh Avenue, New York, New York, visited the above described premises and there observed one natural ranch mink coat which he positively identified as his own and which he said was included in the above-described REA shipment said coat being consigned to Savannah, Georgia.

s/ John J. Kilcommons

3/20/68

s/ Earle N. Bishopp
U.S. Commissioner
Southern District of New York

APPENDIX F

SEARCH WARRANT FOR THE PREMISES AT 178 NORTH AVENUE, NEW ROCHELLE, NEW YORK

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

In the matter of a search warrant for the premises known as Rosalle Furs, 178 North Avenue, New Rochelle, New York

To ANY UNITED STATES MARSHALL OR ANY AUTHORIZED OFFICER

Affidavit having been made before me by John J. Kilcommons, Special Agent, Federal Bureau of Investigation that he has reason to believe that on the premises known as Rosalle Furs, 178 North Avenue, New Rochelle, New York in the Southern District of New York, there is now being concealed certain property, namely fur coats, stoles, jackets and other finished fur products, books, records, and other fruits and instrumentalities which are being kept as fruits and instrumentalities of a violation of Title 18, United States Code, Sections 371 and 659, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist,

APPENDIX F

SEARCH WARRANT FOR THE PREMISES
AT 178 NORTH AVENUE,
NEW ROCHELLE, NEW YORK

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 20th day of March, 1968

s/ Earle N. Bishopp
U.S. Commissioner

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No. 71-710

Supreme Court, U.S.
FILED
JAN 18 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

MAX SCHARFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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MAX SCHARFMAN, PETITIONER

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having possessed furs stolen from an interstate shipment, knowing them to have been stolen, in violation of 18 U.S.C. 659. He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

Petitioner's sole contentions here, as below, relate to the denial of his pre-trial motions to suppress evidence seized by F.B.I. agents pursuant to a search warrant. The seized evidence included books and records of two

corporations owned by petitioner. Petitioner's claim that the affidavits in support of the search warrant failed to establish probable cause is fully answered in the opinion below. Petitioner also contends that the decision below is in conflict with *Hill* v. *Philpott*, 445 F. 2d 1147 (C.A. 7), certiorari denied December 14, 1971, No. 71-442, and *United States* v. *Blank*, 330 F. Supp. 783 (N.D. Ohio), appeal pending, No. 71-1849, C.A. 6, which hold that, in certain circumstances, privately owned books and records are protected by the Fifth Amendment self-incrimination clause from seizure even pursuant to a valid search warrant. Regardless of the correctness of those decisions,[1] they are not in point here. The books and records in this case did not belong to a private person but to corporations, as to whose property petitioner is not entitled to assert the Fifth Amendment privilege against compulsory self-incrimination. See *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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[1] In the government's view, the *Philpott* and *Blank* decisions, the latter of which is closer than *Philpott* to the facts of this case, are erroneous. See, *e.g.*, the contrary rulings in *United States* v. *Hanon*, 428 F. 2d 101, 106-107 (C.A. 8) (*en banc*), certiorari denied, 402 U.S. 952; *United States* v. *Clancy*, 276 F. 2d 617, 629-631 (C.A. 7), reversed on other grounds, 365 U.S. 312; see also *Stanley* v. *Georgia*, 394 U.S. 557, 569-571 (Stewart, J. concurring, joined by Justices Brennan and White).

☆ U.S. Government Printing Office: 1972—454-134/413